Supreme Court, U.S.
FILED
JUN 3 - 2010
OFFICE OF THE CLERK

(2)

No. 09-1143

IN THE
Supreme Court of the United States

LEE O. WILSON, JR.,

Petitioner,

v.

GENE M. JOHNSON, ET AL.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE ALLIANCE FOR JUSTICE IN SUPPORT OF PETITIONER

GERARD J. WALDRON
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW,
Washington, D.C. 20004
(202) 662-6000
gwaldron@cov.com

June 3, 2010

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. Denial of Counsel is Too Important and Too Independent to Evade Immediate Review	3
II. The Prevalence of a Large Number of Untutored Pro Se Litigants Undermines the Adversarial Nature of the Judicial System	8
CONCLUSION	11

TABLE OF AUTHORITIES

Page(s)

CASES

Bradshaw v. Zoological Society of San Diego,
662 F.2d 1301 (9th Cir. 1981) 4

Cohen v. Beneficial Loan Corp.,
337 U.S. 541 (1949) 3

Ficken v. Alvarez,
146 F.3d 978 (D.C. Cir. 1998) 4

Kay v. Ehrler,
499 U.S. 432 (1991) 10

Lariscey v. United States,
861 F.2d 1267 (Fed. Cir. 1988) 4

McKeever v. Israel,
689 F.2d 1315 (7th Cir. 1982) 7

Miller v. Simmons,
814 F.2d 962 (4th Cir. 1987) 4

Noll v. Carlson,
809 F.2d 1446 (9th Cir.1987) 9

Powell v. Alabama,
287 U.S. 45 (1932) 4, 5

Robbins v. Maggio,
750 F.2d 405 (5th Cir. 1985) 4

TABLE OF AUTHORITIES

Page(s)

Roberts v. United States District Court,
339 U.S. 844 (1950) 3

Slaughter v. City of Maplewood,
731 F.2d 587 (8th Cir. 1984) 4

Smith-Bey v. Petsock,
741 F.2d 22 (3rd Cir. 1984) 4

Weygandt v. Look,
718 F.2d 952 (9th Cir. 1983) 4

Wilborn v. Escalderon,
789 F.2d 1328 (9th Cir. 1986) 4

STATUTES

28 U.S.C. 1915(e)(1) 1

OTHER AUTHORITIES

Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 Clearinghouse Rev. 271-280, 280 (July-August 2006) 6

TABLE OF AUTHORITIES

Page(s)

American Bar Association, ABA Report, *The Quest to Fulfill Our Nation's Promise of Liberty and Justice For All: ABA Policies on Issues Affecting Immigrants and Refugees*, ABA Resolution Adopted by the House of Delegates (Feb. 13, 2006) <http://www.abanet.org/poladv/priorities/immigration/107a_righttocounsel.doc> 6

Boston Bar Association Task Force on Unrepresented Litigants, *Report on Pro Se Litigation*, Boston Bar Association (1998) <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf> 8, 10

Amanda Bronstad, *Federal Courts React to Tide of Pro Se Litigants*, The National Law Journal (March 9, 2009) 5, 7

James C. Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director*. Washington: Administrative Office of the United States Courts, 2009 <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederal-Courts/AdministrativeOffice/DirectorAnnualReport.aspx> 5

TABLE OF AUTHORITIES

Page(s)

Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 Ford. L. Rev. 1987 (1999)..... 8

H.R. Rep. No. 1079 (1892)..... 2

Honorable Beverly W. Snukals and Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices From a Judge's Perspective*, 42 U. Rich. L. Rev. 93, 97 (2007)..... 10

Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 Wm. & Mary L. Rev. 737, 756 (2002)..... 5

STATEMENT OF INTEREST OF AMICUS CURIAE

Alliance for Justice ("AFJ") is a national association of over 100 organizations dedicated to advancing justice and democracy. For more than 30 years, AFJ has been leading the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil, and women's rights, children, senior citizens, and other groups. AFJ is premised on the belief that all Americans have the right to secure justice in the courts and to have their voices heard when government makes decisions that affect their lives.

In this case, AFJ is particularly concerned with the inability of a pro se litigant to have his or her appeal immediately heard when denied counsel. The lack of an immediate appeal will often irreparably damage a pro se litigant's case and will discourage litigants from making their voices heard in the courts.[1]

SUMMARY OF ARGUMENT

Congress enacted 28 U.S.C. 1915(e)(1) to enable district courts to appoint counsel for certain civil pro se litigants, thus recognizing that the fair admini-

---

[1] This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

stration of justice is sometimes dependent on appointment of counsel in civil actions. H.R. Rep. No. 1079, 52nd Cong., 1st Sess. 1 (1892) (stating that the statute was designed "to open the United States Courts to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money or property to enter the courts under their rules."). Three courts of appeals have held that denial of a request for appointment of counsel should be immediately appealable under the collateral order doctrine because it is "too important" to wait for subsequent review and also "too independent" of the underlying matter. The reasons for this are both intuitive and supported by empirical evidence: pro se litigants who are denied appointment of counsel can irreparably harm their case if they are forced to proceed with trial without the advice of counsel. An inexperienced pro se litigant can make admissions that prejudice their case, reveal privileged information, neglect to make time-sensitive discovery, or simply run out of resources before the end of the trial, making an appeal of no value. Requiring all pro se litigants to prosecute a civil claim with little chance of success before the trial court, and then asking the pro se litigant to appeal the outcome on the merits *and* the non-appointment of counsel on appeal will work injustice on many litigants with serious claims.

Immediate appeal of non-appointment decisions also will benefit the administration of justice because research shows that judges often deviate from their traditional neutral role when dealing with pro se litigants. Judges are forced to slow down proceedings and often offer disproportionate help to pro se litigants because of their lack of knowledge, working

an injustice on all parties to the proceeding. Procedural rules are sometimes even relaxed to accommodate pro se litigants.

ARGUMENT

Section 1915(e)(1) authorizes district courts to appoint counsel in a civil case for parties who cannot afford counsel. This case presents a significant question that has been addressed by all thirteen courts of appeals and has not yielded a common answer but has evaded review by this Court: Whether the denial of the appointment of counsel is an immediately appealable order under the collateral order doctrine. The collateral order doctrine allows appeals from "a small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

I. DENIAL OF COUNSEL IS TOO IMPORTANT AND TOO INDEPENDENT TO EVADE IMMEDIATE REVIEW

The Court has recognized the right of indigent parties to have their day in court. In *Roberts v. United States District Court*, 339 U.S. 844 (1950), the Court held that denial of *in forma pauperis* status is immediately appealable. Denial of *in forma pauperis* status and the denial of appointment of counsel are similar in that they both may effectively dispose of

the case for the indigent party. As the Court noted in *Powell v. Alabama*, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law." 287 U.S. 45, 68-69 (1932).

Congress recognized the importance of appointing counsel for certain pro se litigants in civil cases by adding Section 1915(e)(1) to Title 28, enabling district court judges to appoint counsel in certain circumstances. Thus, both Congress and this Court agree that certain pro se litigants warrant appointment of counsel. Three courts of appeals have concluded that denial of the appointment of counsel in civil actions is "too important" and "too independent" to be denied collateral review. *See Lariscey v. United States*, 861 F.2d 1267, 1270 (Fed. Cir. 1988); *Robbins v. Maggio*, 750 F.2d 405, 407 (5th Cir. 1985); *Slaughter v. City of Maplewood*, 731 F.2d 587, 588 (8th Cir. 1984). One court of appeals, the Ninth Circuit, has held that appellate jurisdiction rests on the type of claim presented. *See Bradshaw v. Zoological Society of San Diego*, 662 F.2d 1301 (9th Cir. 1981); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983); *Wilborn v. Escalderon*, 789 F.2d 1328, 1330 (9th Cir. 1986). The nine courts of appeals that have reached the opposite conclusion focus on the ability of the district court to correct an error later, *see, e.g., Miller v. Simmons*, 814 F.2d 962, 965-967 (4th Cir.), cert. denied, 484 U.S. 903 (1987), or on the ability for an appellate court to review the matter after the case is over. *Id.* at 967; *Smith-Bey v. Petsock*, 741 F.2d 22, 24-26 (3rd Cir. 1984); *see Ficken v. Alvarez*, 146 F.3d 978, 982 (D.C. Cir. 1998). But these courts of ap-

peals misapprehend the challenges that pro se litigants face in prosecuting their claim.

In 2009, 71,543 civil cases were filed pro se in federal court, amounting to 25.8% of all cases.[2] In addition, 28.4% of appeals from bankruptcy court and 21.9% of appeals from administrative agencies were filed pro se. *Id.* Federal courts have recognized the increasing number of pro se litigants and many courts have begun to set up legal centers in courthouses to provide advice and services for pro se litigants. *See* Amanda Bronstad, *Federal Courts React to Tide of Pro Se Litigants*, The National Law Journal (March 9, 2009). Most pro se litigants in federal court are pursuing employment claims such as violations of the Americans With Disabilities Act and other anti-discrimination statutes. *Id.* The overwhelming majority of pro se litigants are poor and proceed pro se simply because they do not have the money or adequate knowledge to find a lawyer. Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 Wm. & Mary L. Rev. 737, 756 (2002). Because they are not schooled in "the science of law," *Powell v. Alabama*, 287 U.S. at 69, pro se litigants often make critical errors that prejudice their claim and thus poison the proceeding such that denial of counsel would be rendered "effectively unreviewable" on appeal.

For example, a civil pro se litigant may make admissions that are prejudicial to the case or reveal

---

[2] James C. Duff, *Judicial Business of the United States Courts: 2009 Annual Report of the Director*. Washington: Administrative Office of the United States Courts, 2009 <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport.aspx>.

privileged information or case strategy, giving the other side an insurmountable advantage. Pro se litigants also may fail to interview witnesses or pursue adequate discovery, omissions that may become fatal if time is of the essence. Equally significant, a pro se litigant may drastically misvalue her claim. For example, if a plaintiff has an inflated view she may spurn fair offers to settle and thus waste judicial resources. If the plaintiff undervalues her claim, she may agree to an unfair resolution that favors the defendant and cannot be corrected on appeal. Given all the myriad challenges of the judicial system, many pro se litigants, even those with meritorious claims, may also simply choose to withdraw their case due to the heavy demands of a district court proceeding. These are but a few of the tactical errors a pro se litigant may make that are irrelevant to the merits of her claims yet may render them unreviewable on appeal.

It is both noteworthy and not surprising that a large number of studies have shown that parties are much more likely to be successful when represented by an attorney than when proceeding pro se. Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright*, 40 Clearinghouse Rev. 271-280, 280 (July-August 2006). The American Bar Association reported that "persons with qualified and competent legal representation secure relief at far higher rates than pro se litigants."[3] The risk of

---

[3] ABA Report, *The Quest to Fulfill Our Nation's Promise of Liberty and Justice For All: ABA Policies on Issues Affecting Immigrants and Refugees*, ABA Resolution Adopted by the House of Delegates (Feb. 13, 2006) <http://www.abanet.org/poladv/priorities/immigration/107a_righttocounsel.doc> (in 2003, only 14 percent of non-detained

mistakes continues after the district court proceeding ends. A pro se litigant who unsuccessfully pursued a claim may not pursue an appeal, thinking that their failure was due to the merits of the case and not their mistakes in litigating the claim.

Certainly, the number of unsuccessful pro se cases includes many pro se litigants who cannot secure counsel because their claims are unmeritorious or frivolous. But it is a mistake to assume that pro se litigants with meritorious claims will find counsel, an assumption that reflects a view that an "efficient judicial market" will marry up a meritorious claim with counsel. *See, e.g., McKeever v. Israel*, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting) ("Encouraging the use of retained counsel thus provides a market test of the merits of the prisoner's claim. If it is a meritorious claim there will be money in it for a lawyer; if it is not it ought not to be forced on some hapless unpaid lawyer."). Given the lack of education, resources and world experience of nearly all pro se litigants, *see Federal Courts React to Tide of Pro Se Litigants*, even pro se litigants with meritorious claims may find it difficult to find counsel.

This case is important because it highlights a glaring flaw in our legal system that has divided the courts of appeals. Pro se litigants denied counsel may for all practical purposes lose their right of appeal by irreparably damaging their case. This flaw is becoming all the more relevant with the

---

asylum seekers without counsel were granted asylum in comparison to 39 percent with counsel; and for detained asylum-seekers 3 percent gained asylum without counsel compared to 18 percent success with counsel).

increasing number of pro se litigants in federal courts.

II. THE PREVALENCE OF A LARGE NUMBER OF UNTUTORED PRO SE LITIGANTS UNDERMINES THE ADVERSARIAL NATURE OF THE JUDICIAL SYSTEM

The administration of justice also will benefit from counsel appointed for certain pro se litigants in civil proceedings. Empirical evidence has repeatedly shown that judges often deviate from their role as a neutral adjudicator in cases involving pro se litigants. This tendency undermines the adversarial nature of our legal system and creates unfairness and inefficiency for *both* parties. While application of the collateral order doctrine to denials of counsel will not completely alleviate this problem, it will lessen the number of judicial proceedings that do not adhere to the model of a neutral adjudicator and parties represented by effective counsel. This is not an argument for judicial efficiency, but rather a call for improvements to the integrity of the judicial system.

In a study on pro se cases, the Boston Bar Association found that in pro se cases "judges and court personnel are caught between a duty to be impartial and a desire to see justice done." Boston Bar Association Task Force on Unrepresented Litigants, *Report on Pro Se Litigation*, i Boston Bar Association (1998). Notably, judges spend significantly more time on pro se litigants than other parties and court clerks often find themselves becoming tutors to pro

se litigants by helping them comply with court rules. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 Ford. L. Rev. 1987, 2014-2016 (1999). No matter how hard a judge may try to remain neutral, it is inevitable that the judge will spend significant time answering pro se litigants' questions and giving them undue assistance, especially because pro se litigants often desire that every conceivable position be explored by the court, even those that are plainly unmeritorious.

Having judges wear two hats — one of neutral adjudicator and one of patient counselor or teacher — runs contrary to our adversary process. Indeed, judges also are often more lenient with pro se litigants on procedural rules and deadlines. *See, e.g.*, *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987) (holding that courts "provide a pro se litigant with notice of the deficiencies in his or her complaint" to ensure that the litigant uses the opportunity to amend effectively). The Boston Bar Association study also showed that without their own interlocutor, pro se litigants often become frustrated because of unrealistic expectations about the justice system, necessitating the judge to explain the result or else undermining public respect for the judicial system when pro se litigants are turned away for reasons they do not understand.

In the absence of counsel, district courts often have difficulty discerning pro se plaintiffs' claims, even where they may have merit, and court personnel must therefore spend more time than usual to ascertain the allegations and reach legally correct conclusions. Judges are also often tempted to correct the errors of a pro se litigant where they would not do

the same with a regular attorney. The Honorable Beverly W. Snukals and Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices From a Judge's Perspective*, 42 U. Rich. L. Rev. 93, 97 (2007). Case management without counsel present is often more difficult because pro se parties do not understand the discovery rules. One federal judge stated that in the past decade, "I have only had three pro se cases go to trial." *Report on Pro Se Litigation* at 25.

Finally, pro se litigants may be apt to become more emotional than represented parties and have difficulty observing courtroom decorum, creating a circus-like atmosphere in the courtroom. *See Kay v. Ehrler*, 499 U.S. 432 (1991) ("[A pro se litigant] is deprived of the judgment of an independent third party in framing the theory of the case . . . and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom."). These spectacles are inimical to the pursuit of the justice and reduce the public's respect for the judicial system.

Allowing pro se litigants to appeal denial of counsel under the collateral order doctrine will reduce the number of these one-sided trials, and as an added benefit may help dispose of frivolous claims more quickly. Because of their lack of understanding of courtroom procedure pro se litigants may often feel they are being denied justice because the district court is biased against them. *Report on Pro Se Litigation*, at 4. An immediate disposition by an appellate court of a request for counsel has the advantage of either putting counsel in place where the appellate court finds there is good cause for an appointment, or conversely where the immediate appeal is denied, that will impress upon pro se

litigants that they need to proceed alone or not at all with their civil claim.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

GERARD J. WALDRON
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW,
Washington, D.C. 20004
(202) 662-6000
gwaldron@cov.com

Counsel for Amicus Curiae